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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DALLAS WAYNE FINLEY, Defendant and Appellant.	H043668 (Santa Clara County Super. Ct. No. C1508768)

Defendant Dallas Wayne Finley appeals following his plea of no contest to possession of methamphetamine for sale (Health & Saf. Code, § 11378). Defendant asserts that the trial court erred in imposing an electronic search condition, because it is unreasonable and unconstitutionally overbroad.

STATEMENT OF THE CASE[1]

On April 19, 2016, a complaint was filed alleging that defendant possessed methamphetamine for sale (Health & Saf. Code, § 11378; count 1) and that he had been previously convicted of the same offense (Pen. Code, § 1203.073, subd. (b)(8)). The complaint also alleged that defendant had two prior convictions for possession of a controlled substance (Health & Saf. Code, § 11370.2, subd. (c)). Defendant pleaded no contest to count 1 and admitted the truth of the prior conviction allegations.

[1] The underlying facts are omitted because they are not included in the record on appeal.

On June 7, 2016, the trial court sentenced defendant to three years in the county jail, one of which to be spent in custody, and the other two to be spent on mandatory supervision. The court imposed a number of conditions of mandatory supervision. At sentencing, the trial court imposed the following modified condition: "[Defendant] shall provide all passwords to any cellular telephones and computers within his custody or control and shall submit to search at any time without a warrant by any peace officer limited to programs used for interpersonal communications, photos, e-mail, text, and social media."

Defense counsel objected to the condition on the grounds that there was no relationship between the condition and defendant's offense and on the grounds that it was constitutionally overbroad. The court overruled defendant's objection and stated that the condition was appropriate because the case involved the sale of drugs and the condition was limited in scope to "interpersonal communication, photos, e-mail, text, and social media, that's designed to limit it to prevent future criminality . . . ."

On June 9, 2016, defendant filed a timely notice of appeal.

DISCUSSION

Defendant argues that the electronic search condition imposed in this case is unreasonable because it is not related to his offense, prohibits conduct that is not itself criminal, and does not relate to future criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).) In addition, defendant asserts that the condition is unconstitutionally overbroad.

Reasonableness

"In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety . . . ." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) This broad discretion, however, "is not without limits." (*Id.* at p. 1121.) A condition of probation is generally "invalid [if] it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal,

and (3) requires or forbids conduct which is not reasonably related to future criminality.' " (*Lent, supra*, 15 Cal.3d at p. 486.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) We review the imposition of probation conditions for abuse of discretion. (*Ibid*.)

There is no dispute that the second prong of the *Lent* test is satisfied here, because the condition relates to conduct that is not itself criminal. The United States Supreme Court has deemed cell phones "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." (*Riley v. California* (2014) __ U.S. __ [134 S. Ct. 2473, 2484] (*Riley*).) Given that "a significant majority of American adults now own such phones" (*ibid*.)—and the same probably is true for computers, notepads, and social media accounts, we find the electronic search conditions relate to conduct that is not by itself criminal. (See also *In re J.B.* (2015) 242 Cal.App.4th 749, 755 (*J.B.*) ["it is beyond dispute that the use of electronic devices and of social media is not itself criminal"].)

With regard to the first *Lent* factor, we disagree with the People that defendant's crime was related to the use of electronics. The People argue that possession of methamphetamine for sale "is an activity which is commonly associated with the use of electronic devises such as mobile phones." While this statement may be true, there is nothing in this case showing that defendant's crime was connected to his use of any electronic device. The record shows that defendant was charged with his crime as the result of the execution of a search warrant of his home and the seizure of methamphetamine. The prosecutor noted that defendant had a computer in this home, but added no information that the computer was used to support defendant's possession for sale of methamphetamine. We find that the first factor in *Lent*, that the condition have " 'no relationship to the crime of which the offender was convicted,' " is met in this case. (*Lent, supra*, 15 Cal.3d at p. 486.)

The issue remains as to whether the third prong of the *Lent* test is met. Defendant argues that nothing in the record that connects his crime of possession of methamphetamine for sale or his personal history to the use of electronic devices or social media. However, under two California Supreme Court decisions, a search term that facilitates the supervision of a probationer relates to future criminality within the meaning of *Lent*, even if the criminal behavior to be deterred does not relate to the offense of conviction. (*Olguin*, *supra*, 45 Cal.4th at p. 378; *People v. Ramos* (2004) 34 Cal.4th 494, 506 (*Ramos*).)

The probation condition in *Olguin* required the probationer to notify his probation officer of any pets present at his place of residence. (*Olguin*, *supra*, 45 Cal.4th at p. 378.) Convicted of driving under the influence, the defendant argued that the challenged condition was not reasonably related to his future criminality. The court disagreed, noting that "[p]robation officers are charged with supervising probationers' compliance with the specific terms of their probation to ensure the safety of the public and the rehabilitation of probationers. Pets residing with probationers have the potential to distract, impede, and endanger probation officers in the exercise of their supervisory duties. By mandating that probation officers be kept informed of the presence of such pets, this notification condition facilitates the effective supervision of probationers and, as such, is reasonably related to deterring future criminality." (*Ibid*.)

In *Ramos*, the challenged condition required the defendant to submit to a warrantless search of his person, property, automobile, and any object under his control. Ruling on a motion to suppress, the court found the probation search term was valid given the " 'de minimis' " intrusion and " 'greatly reduced' " expectation of privacy " 'when the subject of the search is on notice his activities are being routinely and closely monitored.' " (*Ramos*, *supra*, 34 Cal.4th at p. 506.) The court explained that " 'the purpose of the search condition is to deter the commission of crimes and to protect the

public, and the effectiveness of the deterrent is enhanced by the potential for random searches.' " (*Ibid*.)

Defendant argues we should follow the rationale of two recent juvenile cases that have differed in their treatment of probation conditions similar to the electronic search conditions here. Defendant cites *In re Erica R.* (2015) 240 Cal.App.4th 907 (*Erica R.*) and *J.B., supra*, 242 Cal.App.4th 749. These cases declined to read *Olguin* as sanctioning imposition of electronic search conditions without evidence the probationer is likely to use his or her electronic devices or social media for proscribed activities. Because there was no evidence in the record connecting the minor's conviction for drug possession with her use of electronic devices, the court in *Erica R.*, rejected the juvenile court's justification that " 'many juveniles, many minors, who are involved in drugs tend to post information about themselves and drug usage.' " (*Erica R., supra*, at p. 913.) The court explained that " '[n]ot every probation condition bearing a remote, attenuated, tangential, or diaphanous connection to future criminal conduct can be considered reasonable.' " (*Ibid*.) Similarly in *J.B.*, the court rejected the juvenile court's imposition of electronic search conditions on a minor convicted of petty theft who also had admitted to using marijuana: "[T]here is no showing of any connection between the minor's use of electronic devices and his past or potential future criminal activity. As in *Erica R.*, ' "there is no reason to believe the current restriction will serve the rehabilitative function of precluding [J.B.] from any future criminal acts." ' " (*J.B., supra*, at p. 756.)[2]

We find that *J.B.* and *Erica R.* are distinguishable given that neither case involved the commission of an offense involving possession of drugs for sale. Moreover, both *J.B.* and *Erica R.* stand in contrast with *In re P.O.* (2016) 246 Cal.App.4th 288, 296 (*P.O.*) in

[2] The California Supreme Court has granted review in a third case that followed the reasoning in *J.B.* and *Erica R.* (*In re Mark C.* (2016) 244 Cal.App.4th 520, 535, rev. granted Apr. 13, 2016, S232849.)

which the appellate court upheld a comparable condition under *Lent* despite no direct evidence that the juvenile defendant was inclined to use electronic devices or social media. The minor in *P.O.* admitted to a misdemeanor count of public intoxication. The juvenile court imposed an electronic search condition, reasoning that " 'we have people who present themselves on the Internet using drugs or . . . in possession of paraphernalia, and that's the only way we can properly supervise these conditions.' " (*Id.* at p. 293.) The court affirmed the juvenile court's finding that the condition was reasonably related to future criminality because it "enables peace officers to review P.O.'s electronic activity for indications that P.O. has drugs or is otherwise engaged in activity in violation of his probation." (*Id.* at p. 295.)

Reasonableness under the third prong of the *Lent* test exists when a probation condition "enables a probation officer to supervise his or her charges effectively . . ." (*Olguin*, *supra*, 45 Cal.4th at pp. 380-381), even if the condition "has no relationship to the crime of which a defendant was convicted." (*Id.* at p. 380.) *Ramos* emphasized the deterrence purpose of a probation search condition as it relates to preventing future criminal conduct, including " 'the potential for random searches.' " (*Ramos*, *supra*, 34 Cal.4th at p. 506.) In *P.O.*, the offense was public intoxication, and the court found that enabling supervision of the minor's online activity was reasonably related to monitoring her sobriety. (*P.O.*, *supra*, 246 Cal.App.4th at p. 295.)

Here, the electronic search conditions' effectiveness as it relates to future criminality is to monitor defendant's activity and communications associated with the sale of methamphetamine through the use of his electronic devices and social media. Without question, the use of electronic devices and social media is ubiquitous with the sale of drugs. We find that the electronic search condition is reasonably related to future criminality and the court did not abuse its discretion in imposing it.

Overbreadth

In addition to his argument that the electronic search condition was unreasonable, defendant also asserts that it is unconstitutionally overbroad.

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights . . . ." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) We review de novo the constitutional challenge to the probation conditions. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

Defendant relies on the recent United States Supreme Court decision in *Riley, supra*, __ U.S. at pages __ [134 S.Ct. at pp. 2494-2495], wherein the court considered the privacy concerns in the context of warrantless cell phone searches. "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' " (*Ibid.*)

Riley identified several "consequences for privacy" that arise from the massive storage capacity of these "minicomputers" and their pervasiveness, including the revelatory quality of "distinct types of information" available all in one place and the depth of information that may be conveyed. (*Riley, supra*, __ U.S. at p. __ [134 S.Ct. at p. 2489].) "[I]t is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate." (*Id.* at p. __ [134 S.Ct. at p. 2490].)

Defendant cites *Riley* to argue that requiring him to turn over passwords for his electronic devices and social media accounts implicates privacy concerns that go beyond the general search conditions of his probation. The People note that in *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, this court rejected a similar argument and

determined the "[d]efendant's constitutional privacy rights are not improperly abridged by the password conditions any more than they are by the search condition." (*Id*. at p. 1176.) We note that in *Ebertowski*, the defendant used electronic devices and social media to promote his gang activity. This court found that the probation department needed to monitor defendant's gang communications and that the conditions did not unreasonably infringe on defendant's privacy rights any more than a standard search condition. Moreover, the defendant in *Ebertowski* did not suggest how the password conditions could be more tailored to protect defendant's privacy. (*Id*. at p. 1175.)

Defendant notes that in contrast to *Ebertowski*, in *People v. Appleton* (2016) 245 Cal.App.4th 717, 721, a different panel of this court considered whether a condition allowing the search of " '[a]ny computers and all other electronic devices belonging to the defendant, including, but not limited to cellular telephones, laptop computers or notepads . . . for material prohibited by law,' " was unconstitutionally overbroad. This court answered the question in the affirmative, finding that the condition as worded "could potentially expose a large volume of documents or data, much of which may have nothing to do with illegal activity." (*Id*. at p. 725.) This court found that the condition was overbroad, and needed to be narrowed to reduce the likelihood that a search would garner significant private personal information.

Here, unlike the condition in *Appleton*, the electronic search condition is tailored to achieve the probation department's interest in deterring defendant's drug sales activity. Specifically, the condition limits searches "to programs used for interpersonal communications, photos, e-mail, text, and social media." This is not a broad sweeping condition that could amount to an "unfettered search of vast amounts of personal information unrelated to [defendant's] criminal conduct or potential for future criminality . . . ." The condition is tailored to reveal defendant's personal communications, and does not allow all-encompassing searches of defendant's electronic

devices. As such, the condition is sufficiently limited so as not to unlawfully infringe on defendant's right to privacy.

DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Mihara, J.